

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2013AP50-CR
2013AP51-CR**

**Cir. Ct. Nos. 2009CF1332
2010CF524**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE D. GUSTAFSON,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Lee Gustafson appeals orders denying his motion for sentence modification and denying his motion for reconsideration. He contends: the sentencing court erred by placing too much weight on some factors in the face of contravening considerations; his diagnosis with gender identity

disorder and the Department of Corrections' conclusion that he does not need intensive sex offender treatment constitute new factors; and the court relied on inaccurate information during sentencing. The circuit court denied the motions without a hearing. We affirm the orders.

¶2 Gustafson entered no contest pleas to one count of repeated sexual assault of a child and one count of second-degree sexual assault of another child. The court imposed concurrent sentences totaling four years' initial confinement and five years' extended supervision. Gustafson did not challenge the sentences under WIS. STAT. §§ 971.19 or 974.02 (2011-12).¹ Instead, citing new factors and WIS. STAT. § 974.06, he requested a reduced sentence of two years, six months' initial confinement and six years, six months' extended supervision. The circuit court denied the motion without a hearing and denied Gustafson's motion for reconsideration.

¶3 The court may deny a postconviction motion without a hearing when the facts alleged in the motion, if true, do not entitle the defendant to relief, or if the key factual allegations are conclusory, or if the record conclusively demonstrates that the defendant is not entitled to relief. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. Gustafson's motions do not establish an adequate basis for a hearing.

¶4 Gustafson's argument that the trial court erroneously exercised its sentencing discretion fails on procedural grounds and on the merits. As a procedural matter, the issue could not be raised under WIS. STAT. §§ 971.19 or

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

974.02 because the time for bringing those motions had expired. While a collateral attack under WIS. STAT. § 974.06 can be made at any time, that statute cannot be used to challenge a sentence as an alleged improper exercise of discretion. *State v. Nickel*, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765.

¶5 On the merits, the argument fails because the court appropriately considered the seriousness of the offenses, Gustafson's character and the need to protect the public. See *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The court noted that Gustafson took advantage of the young victims placed in his trust, and it appropriately imposed a sentence to deter him from victimizing other children. The court concluded it would unduly depreciate the seriousness of the offenses to place Gustafson on probation. Gustafson notes his lack of a prior record, his admission to the crimes, the steps he took to change his behavior before involvement of the legal system and his age at the time the offenses occurred. All of these mitigating factors explain Gustafson's relatively lenient sentence. The court could have imposed consecutive prison terms totaling 100 years' imprisonment. Gustafson asserts intensive treatment provided only in a prison setting is not necessary and the court placed too much weight on the seriousness of the offense and the need to protect the public. The weight to be given these factors is solely within the sentencing court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶6 Gustafson's postconviction diagnosis of gender identity disorder is not a new factor. A new factor is a fact highly relevant to the imposition of sentence, but not known to the trial judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

Gustafson's gender identity issues were facts in existence at the time of sentencing and were addressed in the presentence investigation report. Gustafson was also personally aware of these issues. Therefore, the gender identity disorder was not overlooked by the sentencing court and was not unknowingly overlooked by *all* of the parties. Gustafson's motion does not identify anything about a formal diagnosis occurring after sentencing that would be more meaningful to the imposition of sentence than the information already provided at the time of sentencing. The sentencing court did not consider Gustafson's gender identity issues to be either an aggravating or mitigating factor. The disorder, whether formally diagnosed or not, was not highly relevant to the sentences imposed.

¶7 Gustafson's postconviction treatment assessment is not a new factor. The Department of Corrections determined Gustafson does not meet the criteria for pedophilia and therefore is not a suitable candidate for treatment of that disorder. That does not mean that Gustafson would not benefit from any type of treatment. In addition, nothing in the sentencing court's remarks suggests the length of the sentences was premised on an expectation that Gustafson would need or receive a specific type of sex offender treatment. The court ordered sex offender treatment as a condition of Gustafson's extended supervision. Gustafson's request to shorten his initial incarceration time bears no relationship to the question of whether he would benefit from continued sex offender treatment.

¶8 Gustafson next contends he was sentenced on the basis of inaccurate information. He takes issue with the court's consideration of the fact that his victims are his cousins, which the court considered an aggravating factor. That is not a factual error. Whether the relationship is an aggravating factor is a matter for the sentencing court to determine. *See State v. Thompson*, 172 Wis. 2d 257,

267, 493 N.W.2d 729 (Ct. App. 1992). The court reasonably viewed the relationship as an aggravating factor because Gustafson betrayed the family trust, a matter that impacted the victims and impugns Gustafson's character. *See State v. Fuerst*, 181 Wis. 2d 903, 916, 512 N.W.2d 243 (Ct. App. 1994).

¶9 Finally, Gustafson contends the prosecutor improperly opined on his psychological state by describing his attitude as “almost arrogant.” That argument reflects the prosecutor's opinion. The sentencing court did not adopt that opinion and Gustafson does not identify any fact the court relied on that is demonstrably untrue.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

